PP

v.

INI ABONG & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL TRIAL NOS: 45-08-2004-II, 45-03-2005-III/I, 45-01-2006-II, 45-02-2006-II & 45-04-2006-I]
15 AUGUST 2008

CRIMINAL LAW: *Kidnapping Act 1961 - Section 3 - Confining a person with intention to hold for ransom - Alleged kidnap victim not present in court and nowhere to be found - Whether charge could be sustained - Issue of ransom - Whether clearly made out - Definition of "ransom" - Prima facie case - Kidnapping Act 1961, s. 2 - Criminal Procedure Code, s. 173(g)*

WORDS & PHRASES: *"ransom" - Kidnapping Act 1961, s. 2 - Definition of*

The five accused in this case were charged separately – but tried jointly – for the offence of wrongfully confining a person with the intention to hold for ransom under s. 3 of the Kidnapping Act 1961 ('Act') read with s. 34 of the Penal Code. The prosecution had never found the person who was said to have been wrongfully confined. During the course of the trial, the defence framed two questions under s. 173(g) of the Criminal Procedure Code: (i) whether a charge under s. 3 of the Act could be sustained where the victim allegedly kidnapped did not come to court to give evidence; and/or (ii) whether a charge under s. 3 of the Act could be sustained where the victim allegedly kidnapped was nowhere to be found. The defence contended that the prosecution had not made out a *prima facie* case.

Held (acquitting and discharging the five accused):

(1) A charge for kidnapping is unlikely to succeed if the victim is not present to appraise the court whether he or she was forcefully detained or not, unless the victim is not in a position to narrate the incident, *etc.* Further, the absence of the victim and her evidence would show that the prosecution had not established one of the elements of the offence. In this case, from the evidence, it was quite clear that the victim and the

complainant ('PW3') were Indonesians. The prosecution was unable to show that the victim and the complainant lawfully entered and left Malaysia on the relevant dates. The prosecution's case relied heavily on the evidence of PW3 whose demeanour, during the course of evidence, did not reflect the evidence of a truthful witness. The defence had also highlighted many discrepancies in PW3's evidence. On the facts of the case, it was unsafe to rely on PW3's evidence. Further, the prosecutor had not preferred a charge of murder against the accused even though it was not too late to do so and this would show that the prosecution was unsure whether the victim was alive. It was the prosecution's allegation that the victim was last seen with the accused and no charge of murder was preferred. In addition, the prosecution had not satisfied the court as to the issue relating to ransom. In the context of this case, it was clear that the definition of "ransom" must necessarily mean any sum or consideration claimed without consideration. Section 2 of the Act uses the word "money" and also the word "consideration". Established dictionaries also supported this proposition and the payment is said for the release *ie*, the consideration is for the release, and not otherwise, to constitute ransom. *Selvaraju Satippan v. PP* (not foll). For the reasons stated above, the prosecution had not established a *prima facie* case. (paras 15, 16, 19 & 20)

Case(s) referred to:

Ali Khalifa & Ors v. Emperor AIR [1936] Patna 103 ***(refd)***

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Connelly v. Director of Public Prosecutions [1964] 2 All ER 401 ***(refd)***

Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 ***(refd)***

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Metropolitan Bank Ltd & Anor v. Pooley [1881-5] All ER Rep 949 ***(refd)***

MP v. Sudbir Pingle AIR 2000 SC 665 ***(refd)***

PP v. Goh Meng Kun (Criminal Trial No: 45-01-2006-I) (Unreported) ***(refd)***

PP v. Ini Abong (Criminal Trial No: 45-08-2004-II) (Unreported) ***(refd)***

PP v. Ling Hock Huat (Criminal Trial No: 45-03-2005-III(I)) (Unreported) ***(refd)***

PP v. Mohamed Said [1984] 1 MLJ 50 ***(refd)***

PP v. Mohd Aszzid Abdullah [2007] MLJU 300 ***(refd)***

PP v. Ong Kim Hoe (Criminal Trial No: 45-04-2006-I) (Unreported) ***(refd)***

PP v. Sydney Lau Chi Yin (Criminal Trial No: 45-02-2006-II) (Unreported) ***(refd)***
PP v. Zainuddin & Anor [1986] 2 MLJ 100 ***(refd)***
Public Prosecutor v. Lau Ngiik Yin [2007] 1 LNS 548 ***(refd)***
Ramakanta Panda & Ors v. Smt Satyabhama Panda [1995] Cri LJ 2409 ***(refd)***
Re Hj Khalid Abdullah; Ex-Parte Danaharta Urus Sdn Bhd [2008] 2 CLJ 326 ***(refd)***
Selvaraju Satippan v. PP [2004] SGCA 53 ***(not foll)***
Sunny Ang v. PP [1965] 1 LNS 171 ***(refd)***
The State of UP & Anor v. Jaggo alias Jagdish and Others AIR [1971] Supreme Court 1586 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 4, 5, 173(g)
Federal Constitution, art. 145(3)
Judicature Act 1964, s. 25(1)
Kidnapping Act 1961, ss. 2, 3
Penal Code, s. 34

Other source(s) referred to:
Ratanlal & Dhirajlal's, *Criminal Procedure Code*, 15th edn, p 386

For the accuseds - Orlando Chua (Shankar Ram with him); M/s Thomas, Shankar Ram & Co
For the complainant - Steve Ritikos DPP

Reported by Suresh Nathan

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment at the end of the prosecution's case, in respect of the five accused who were charged separately for an offence under s. 3 of the Kidnapping Act 1961 (KA 1961) read with s. 34 of the Penal Code. The trial was held jointly.

[2] The charges read as follows:

(i) *PP v. Ini ak Abong* (Criminal Trial No: 45-08-2004-II):

> That you together with Goh Meng Kun, Ling Hock Huat, Sydney Lau Chi Yin and Ong Kim Hoe on the 24 day of August, 2004, at about 2.40 p.m. at Room No. 1412, 14th Floor, Chonglin Plaza, Jalan Green, in the district of

Kuching, in the State of Sarawak, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Niyo ak Midin (f) 45 years old, and you have thereby committed an offence punishable under s. 3 of the Kidnapping Act, 1961, read with s. 34 of the Penal Code.

(ii) *PP v. Ling Hock Huat* (Criminal Trial No: 45-03-2005-III(I)):

That you together with Goh Meng Kun, Ling Hock Huat, Sydney Lau Chi Yin and Ong Kim Hoe on the 24 day of August, 2004, at about 2.40 p.m. at Room No. 1412, 14th Floor, Chonglin Plaza, Jalan Green, in the district of Kuching, in the State of Sarawak, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Niyo ak Midin (f) 45 years old, and you have thereby committed an offence punishable under s. 3 of the Kidnapping Act, 1961, read with s. 34 of the Penal Code.

(iii) *PP v. Goh Meng Kun* (Criminal Trial No: 45-01-2006-I):

That you together with Ling Hock Huat, Ini ak Abong, Sydney Lau Chi Yin and Ong Kim Hoe on the 24th day of August, 2004, at about 2.40 p.m. at Room No. 1412, 14th Floor, Chonglin Plaza, Jalan Green, in the district of Kuching, in the State of Sarawak, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Niyo ak Midin (f) 45 years old, and you have thereby committed an offence punishable under s. 3 of the Kidnapping Act, 1961, read with s. 34 of the Penal Code.

(iv) *PP v. Sydney Lau Chi Yin* (Criminal Trial No: 45-02-2006-II):

That you together with Goh Meng Kun, Ling Hock Huat, Ini ak Abong and Ong Kim Hoe on the 24th day of August, 2004, at about 2:40 p.m. at Room No. 1412, 14th Floor, Chonglin Plaza, Jin. Green, in the district of Kuching, in the State of Sarawak, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Niyo ak Midin (1) 45 years old, and you have thereby committed an offence punishable under s. 3 of the Kidnapping Act, 1961 read with s. 34 of the Penal Code.

(v) *PP v. Ong Kim Hoe* (Criminal Trial No: 45-04-2006-I):

> That you together with Goh Meng Kun, Ini ak Abong, Sydney Lau Yin and Ling Hock Huat on the 24 day of August, 2004. at about 2:40 p.m. at Room No. 1412, 14th Floor, Chonglin Plaza, Jalan Green, in the district of Kuching, in the State of Sarawak, in furtherance of the common intention of you all, with intent to hold for ransom, did wrongfully confine one Niyo ak Midin (f) 45 years old, and you have thereby committed an offence punishable under s. 3 of the Kidnapping Act, 1961 read with s. 34 of the Penal Code.

Preliminaries

[3] In this case, from the note of proceedings recorded by the previous judge, even before the commencement of the proceedings there was much argument whether it was proper for the prosecution to commence proceedings as charged. One of the reasons being, the person who is said to have been wrongfully confined has never been found by the prosecution. During the course of trial, the defence on 10 July 2007 framed two questions under s. 173(g) of the Criminal Procedure Code:

> (1) Can a charge under section 3 of the Kidnapping Act 1961 be sustained where the victim allegedly kidnapped does not come to Court to give evidence; and/or;
>
> (2) Can a charge under section 3 of the Kidnapping Act 1961 be sustained where the victim allegedly kidnapped is nowhere to be found.

I heard the submission and with consent of the parties it was agreed that I deliver my judgment at the end of the prosecution case, which I shall deal with shortly.

Brief Facts

[4] The prosecution in the opening speech had adequately dealt with the facts of the case and *inter alia* it reads as follows:

> This is a case of kidnapping under section 3 of the Kidnapping Act 1961 read with section 34 of the Penal Code, the five accused persons are tried together on a charge of wrongful confinement of one Niyo ak Midin (f) 45 years old with intent to hold for ransom, and the act was done in furtherance of their common intention.

On the 24-8-2004 at about 2.40 pm when the complainant Jutin ak La'is together with his wife Niyo ak Midin came out from Chris Medical Clinic, Pasar Bau and were walking towards their car, suddenly four males forced him and the wife into a car. Jutin ak La'is and his wife were then brought to Room No. 1412 Chonglin Plaza Condominium Green Road, Kuching. While they were in the said room, Jutin ak La'is saw a person who he knew by the name of Lau Beh. He was alleged to have owed Lau Beh RM4 million. Jutin ak La'is and the wife were then confined to said room and guarded by a group of persons.

On the 25-8-2004 Lau Beh brought Jutin ak La'is to see a lawyer John Lau. At his office, Jutin ak La'is was forced to sign a document to the effect that Jutin ak La'is owes Lau Beh RM1 million. Jutin ak La'is was then released by the group and told to look for one million within 3 days or otherwise his wife which the group were still holding at that time would be killed.

On 26-8-2004, Jutin ak La'is called Lau Beh and was allowed to talk to the wife and the wife informed him that she was brought to another place by the same group and confined there. On 28.8.2004, Jutin ak La'is was only able to raise up to RM200,000, he called Lau Beh but Lau Beh refused to accept that amount and Lau Beh also said that Jutin ak La'is had reported this to the police and he did not want to talk further. Thereafter, Jutin ak La'is was unable to contact Lau Beh anymore.

Police investigation revealed that all the accused persons were directly involved in this case. To date, the victim Niyo ak Midin has yet to be traced and no information so far as to whether she is still alive or otherwise. Prosecution will adduce direct and circumstantial evidence to prove that there was wrongful confinement with intent to hold for ransom in this case and the accused persons had committed the said offence in furtherance of common intention.

The evidence was summarised by the defence as follows:

The prosecution's case it is humbly submitted will stand or fall, depending on whether or not the star witness PW3 Jutin ak La'is's testimony could weave sufficient evidence to establish all the essential ingredients of the charge preferred against the defendants.

Perhaps for the purpose of refreshing our memory it might be convenient to set out those essential ingredients of the charge against the defendants:

(i) that all the 5 defendants had in furtherance of a common intention;

(ii) with intent to hold for ransom;

(iii) against Niyo ak Midin's will or consent, wrongfully confined the same.

Brief Facts: According to PW3 on the 24th August 2004 he together with his purported wife. Niyo ak Midin ("Niyo") were forcibly abducted against their will by 4/5 strangers from outside Chris Medical Clinic, Bau, and were ferried to an apartment in Chong Lin Plaza, Jalan Green, Kuching. Thereat they met up with the 3 defendant Goh Meng Kim a.k.a. Lau Beh where apparently demands were made by the latter for PW3 to repay a certain sum of money. This sum of money was allegedly a debt owed by PW3 to the 3 Defendant for money invested in some timber related business venture in Indonesia and was subsequently lost mid/or unaccounted for by PW3. Negotiations then took place in the apartment at Chong Lin Plaza.

Sometime late into the day a deal was seemingly struck whereby PW3 had agreed to pay the 3 defendant one million ringgit. Parties were supposed to see and instruct a lawyer the next day to have the said deal reduced into writing.

On the 25th August 2004 at about 11 a.m. PW3 was apparently taken by the 3rd defendant and some others to the office of PWI5 Lau Wel Puong, a lawyer, to have the deal drawn out. The deal was reduced into a written agreement and was marked as Exh. D6. According to PW3 when parties were at the office of PWI 5, Niyo was left alone at the apartment at Chong Lin Plaza.

After the signing of the said agreement D6, PW3 was driven in his own Toyota Hilux and was taken to Bau. PW3 was apparently asked to go back to Indonesia to start looking for some money to pay the said debt. PW3 was then said to be alone without Niyo with him.

PW3 told us that be was not able to raise the one million ringgit stated as the amount owed in D6. That inability was allegedly communicated to PW3. Subsequently on the 30 August 2004 a police report was lodged by PW3 (Exh. P7). All the 5 defendants were later arrested. According to PW3 to-date, he does not know the whereabouts of Niyo. Neither does he know whether she is dead or alive.

My Lord, it is firstly submitted that most of what PW3 said must be taken with a pinch of salt. He has been shown to bend whichever way the wind blows. For starters, right after PW3 had taken his oath, he had the audacity to tell this Court that he is a farmer; trying to play the country bumpkin and thereby fishing for sympathy.

I will not attempt to repeat in great details as to what PW3 had told us. It is perhaps salient to note the followings:

> PW3 had admitted under oath (for what is worth!) that on the day in question he had bad been ill for a couple of days already. Apart from his purported wife, Niyo, no one else knew that be was feeling poorly and that he was going to seek treatment at Chris Medical Clinic, Bau. Bau my Lord is about 45 minutes drive away from Kuching.

Under xx PW3 had also us that his Toyota Hilux was pretty new at the time and that he had never, told the 3rd Defendant about its existence. Similarly PW3 also agreed that ho did not have any direct contact with the 3 defendant before 2004.

It was asked of PW3 during xx as to whether or not he could explain as to how the 415 complete strangers knew of his movement on the day in question and he admitted he did not know (as to how they knew). It was then suggested to him that his movement that day was communicated to the 3rd defendant through one Budi Wong and be disagreed. It was also put to PW3 that the meeting with the strangers that day in front of Chris Medical Clinic was in fact pre-arranged but for the venue and again he disagreed. It was suggested to him that it was in fact him (PW3) who had requested through the said Budi Wong to set up a meeting with the 3rd defendant and of course he disagreed. Budi Wong, my Lord, was of course one of the signatories to the 'Persetujuan Bersama' dated the 10th October 2002 (Exh. Dl) wherein PW3 and the 3rd defendant were also co-signatories. It is submitted that it is more likely 'than not that PW3 knew the said Budi Wong well *albeit* PW3 bad tried his levelled best to distance himself from the former.

My Lord, PW3 was then confronted with the police report lodged by the 3rd defendant. It was dated a day before the incident ie, the 23rd August 2004. In a nut-shell the said report ("DID 5") gave a background as to the business deal between the 3rd defendant, PW3 and the said Budi Wong and also as to how PW bad breached the same. More importantly perhaps my Lord was the disclosure by the 3rd defendant in the said police report that:

> Saya datang ke balai buat laporan dan memaklumkan kepada pihak polis untuk berjumpa dengan Jutin ak Lois ... untuk menjelaskan wang beri kepada dia serta 13 kenderaan. Sekiranya dia tidak dapat menyelesaikan masalah ini saya akan buat laporan semula untuk tindakan mahkamah.

The above, my Lord goes to corroborate the pre-arranged intended meeting between PW3 and the 3rd defendant.

My Lord, it is undisputed that at no time during the journey from Chris Medical Clinic, Bau to Chong Lin Plaza, Kuching, were the lives of PW3 andlor his purported wife ever been threatened. It was admitted by PW3 that at no time were weapons been produced to intimidate anyone either. And *albeit* PW3 had every opportunity to scream for help on numerous occasions, he never did so and neither did his purported wife.

It is also hereby submitted that if indeed the defendants had any sort of clandestine, intention they would have picked a more secluded venue and definitely not Chong Lin Plaza which in the words of PW3, "... was very busy" and that members of the public have access thereto. Common sense, my Lord, would dictate that the Defendants would not have wanted to expose themselves to members of the public at all.

It is also to be noted, my Lord that in the course of negotiation between PW3 and the 3rd defendant, 2 police officers were asked by the latter to come into the apartment where the meeting was taking place. PW7 L/Cpl Matif and PW8 L/Cpl Zamri were at the apartment as they were apparently asked by the 3rd defendant to take down some statements from PW3 and his purported wife. That again begs the question, would the 3rd defendant in his right mind, alert police authority, not once but twice, if indeed he had bad intention to do something which is against the law?

My Lord to cut the story short, it is humbly submitted that on the day in question, PW3 and his purported wife followed the 1st, 2nd, 4th and 5th defendants from Chris Medical Clinic, Bau, voluntarily to meet up with the 3rd defendant. There can be no other logical explanation.

There was clear and unequivocal admission by PW3 when under xx that he had signed the written agreement (Exh. D6) voluntarily. We would also recall that when PWI5 Lau Wei Puong testified, he went on to corroborate the fact that that was so. Insofar as PW15 is concerned, the preparing/signing of D6 was " – a run of the mill matter, and nothing special."

In the premises, PW3 and his purported wife cannot therefore by any stretch to have been said to be "... wrongfully confined ..." against their respective will at any time.

My Lord, the charge preferred against the Defendants is anchored on the allegation that the Defendants, in furtherance of the common intention, with intent to hold for ransom, "... did wrongfully confine one Niyo ak Midin ...". That appears to be the central issue to be decided by your Lordship.

It is respectfully submitted that the answer to that central issue was ably answered by my learned colleague, Mr. Shankar Ram when parties were directed to answer the 2 questions framed by your Lordship, the same of which were reproduced m paragraph 2 above. Your Lordship's kind attention is drawn to the "Submission of the Defence" dated the 13th July 2007, from paragraphs 17 to 24 of the same for the answer thereto.

My Lord, it is also respectfully submitted that there is a serious doubt as to the existence of the purported wife of PW3 who were allegedly abducted and wrongfully confined by the Defendants, It is noted that none of the independent witnesses called by the Prosecution could positively identified her at all.

Take for example PW10 Sandry ak Gohin, the clinic assistant from Chris Medical Clinic. During xx she has admitted that on the day in question, she had no special reason to pay any particular attention to the lady who was with PW3 at the time. That was why she was not able to identify the lady in the photo immediately. She, as at the time of her testimony, was still not sure, i.e. the positive identification of the said lady. Neither could PWW7 and 8, the two police officers.

Then my Lord we have PW1 Jonathan ak Mapang. the immigration officer, the so-called 'surprise witness' of the Prosecution, It might be an understatement to say that Ins admission as to his cavalier manner in carrying out his mandatory duty is shocking; he had admitted that whilst it is mandatory for him to stamp all passports upon someone entering/exiting Sarawak, be however did not stamp PW3's passport when PW3 crossed over the Serikin cheek-point to enter Kalimantan. That would in all probability explain as to the statement of truth (as admitted by PW11 under xx) that there is simply no record that PW3's purported wife, Niyo, had entered Sarawak on the 24th August 2004.

Indeed my Lord, PW17 DSP Bong Lian Ming, the Investigating Officer of this case, when under xx, had to concede that in view of the above, PW3 'a purported wife might never have entered Sarawak on the 24th August 2004. There was no such record of entry. So my Lord, who was the mysterious lady who was seen together with PW3 at Chris Medical Clinic on that day? Surely it wasn't Niyo ak Midin!

The Law

[5] The law in respect of kidnapping is found in the Penal Code as well as KA 1961. The Penal Code deals with issues of kidnapping and abduction in respect of specific cases. However, KA 1961 is more general in nature and the punishment is much more severe. KA 1961 may apply to all kidnapping cases inclusive of those found in the Penal Code, as it is an Act to provide for the detection and punishment of the offences of abduction, wrongful restraint and wrongful confinement for ransom and other related offences and for matters incidental thereto.

Defence Application

[6] The defence has framed two questions which I have stated earlier. The defence relies on s. 173(g) of CPC and the inherent powers of the court. However, the prosecution objects vehemently and says as follows: (a) the court cannot acquit the accused without hearing all the evidence to be adduced by the prosecution; (b) even if the victim in this case cannot be found or called to give evidence, it cannot be said that the court can acquit the accused because as in this case, the prosecution has only called three witnesses to testify, furthermore, the complainant, ie, the husband of the victim is still at the stage of cross-examination (ie, at the material time of the defence application); (c) thus, it would be premature to decide that all evidence has been adduced to justify the acquittal of the accused at this early stage of the trial.

[7] And relies on the following cases: (i) *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; (ii) *Public Prosecutor v. Zainuddin & Anor* [1986] 2 MLJ 100; (iii) *Public Prosecutor v. Mohamed Said* [1984] 1 MLJ 50.

[8] It must be emphasised here that the cases cited by the prosecution dealt with appeals relating to summary trials. In the instant case, the trial is held in High Court and to that extent the restrictions stated in those cases may not be relevant. There is no

such restriction imposed on the High Court as set out in s. 173(g) of CPC, in respect of trials in the High Court. This clearly shows that the legislators have not disturbed the inherent jurisdiction of the High Court. The High Court always has the power and jurisdiction to arrest a wrong at *limine* and advance the remedy at the earliest opportunity. For this purpose, there is no necessity to search for such powers or jurisdiction in the criminal procedure code as advocated by the learned deputy public prosecutor. Support for my proposition has been well articulated by a number of decisions. Some of them are as follows:

(a) In *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183, the Supreme Court opined:

> In the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the power to do the right and undo wrong in the course of administration.

(b) The Supreme Court of India in the case of *M.P. v. Sudbir Pingle* AIR [2000] SC 665 held that the charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence if any, cannot show that the accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trial. The court opined:

> In our view, it is apparent that the entire approach of the High Court is illegal and erroneous. From the reasons recorded by the High Court, it appears that instead of considering the *prime facie* case, the High Court has appreciated and weighed the materials on record for coming to the conclusion that charge against the respondents could not have been framed. It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against, the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court Is satisfied that a *prima facie* case is made out for proceeding further then a charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even

if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, cannot show that accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trail. In *Niranjan Singh Karam Singh Punjabi etc. v. Jitendra Bhimraj Bijjayya* etc ... reported in [1990] 4 SCC 76: (AIR [1990] SC 1962: 1990 Cri LJ 1869), after considering the provisions of ss. 227 and 228, Cr. PC Court posed a question whether at the stage of framing the charge, trial Court should marshal the materials on the record of the case as he would do on the conclusion of the trial? The Court held that at the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the accused could be charged ... The Court may persue the records for that limited purpose, but it is not required to marshal with a view to decide the reliability thereof. The Court referred to earlier decisions in *State of Bihar v. Ramesh Singh* [1977] 4 SCC 39: (AIR [1977] SC 2018: 1977 Cri LJ 1606), *Union of lndia v. Prafulla Kumar Samal* [1979] 3 SCC 4: (AIR [1979] SC 366: 1979 Cri LJ 154) and *Supdt. of Remembencer of Legal Affairs, West Bengal v. Anil Kumar Bhunja* [1979] 4 5CC 274: (AIR [1980] SC 52: 1979 Cri LJ 1390), and held thus:

> From the above discussion it seems well settled that at the ss. 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose shift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(c) Learned authors of Ratanlal & Dhirajlal's on *Criminal Procedure Code*, 15th edn at p. 386 make the following observations:

> After the stage of framing a charge there can be only one of the two conclusions to the trial, either the accused is convicted or acquitted. If after framing of charge no evidence is led on the basis of which court could convict the accused, then only an order of acquittal can be passed, and not of discharge. Before framing a charge, the Court needs not undertake an elaborate enquiry needs only to

A consider whether no sufficient grounds exist for proceeding against the accused. If it is so found, the accused will be discharged otherwise charge shall be framed and the accused be put to trial.

B (d) There are a number of English decisions which support the proposition that a judge of a Superior Court has inherent powers to decline to allow a prosecution to proceed if he is satisfied that it is oppressive and vexatious and an abuse of the process of the court. To name a few are as follows:

C (i) In *Connelly v. Director of Public Prosecutions* [1964] 2 All ER 401:

> The court has, I think, a power to apply, in the exercise of its judicial discretion, the broader principles to cases that do not fit the actual pleas and a duty to stop a prosecution which on the facts offends against those principles and created abuse and injustice.

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(ii) In *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497:

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> It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred

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(iii) In *Metropolitan Bank Ltd. & Anor v. Pooley* [1881-5] All ER Rep 949:

> There is an inherent power in every court of justice to stay a manifestly vexatious suit and so protect itself from an abuse of its procedure.

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[9] In our context it, will also mean that the High Court pursuant to the reversionary jurisdiction can arrest any form of wrongful prosecution, if the interest of justice demands it. In crux, I will say that there is no wisdom to advocate that the court has no inherent powers to arrest a wrong. No doubt, court will for all

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practical purposes recognise the decision of the Attorney General to prosecute the matter pursuant to art. 145(3) of the Federal Constitution. However, once the matter is brought to the court and the *bona fide* of the decision is challenged the court always has inherent jurisdiction to address the issue. (See *Long bin Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80). In *Public Prosecutor v. Lau Ngiik Yin* [2007] 1 LNS 548, I have observed:

> The prosecution relied on a number of cases to support the proposition that it will only be proper to order DNAA at this stage of proceedings. The cases are as follows: (i) *PP v. Karuma* [1980] 2 MLJ 102; (ii) *Chi Chee Peng v. PP* [1973] 2 MLJ 35; (iii) *PP v. Zainuddin* [1986] 2 MLJ 100; (vi) *Karpal Singh v. PP* [1991] 2 MLJ 544. More importantly the prosecution says and asserts as follows:
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> > Article 145(3) of the Federal Constitution and section 376 CPC give the AG an exclusive power respecting direction and control over criminal matters. Article 145(3) FC declares that "the AG shall have power, exercisable at his discretion to institute, conduct or discontinuance any proceeding for an offence. Therefore it is not for the court to say when the prosecution has to come to an end and thus acquit the accused on the basis of no evidence. If the court acquit the accused without hearing the evidence they have usurped the PP's powers because the court has no power to stop the prosecution from performing its duty by acquitting without hearing the evidence.
>
> The submission of the prosecutor that the decision and powers of the public prosecutor is immutable and cannot be question by the court is a proposition unsustainable under the Federal Constitution. The court is the Supreme Arbiter of what is, right and wrong. Any public decision maker is always subject to judicial scrutiny. Ordinarily a challenge on the decision of any public decision maker is done by way of proper application within the concept of judicial review. That does not necessarily mean that the court has no powers or jurisdiction at any time to exercise its prerogative powers, when justice demands. Such prerogative powers will only be exercised in extreme situation either when it is necessary and essential to protect and safe guard the Federal Constitution and/or where the spirit and intent of the Federal Constitution is violently breached by the public decision maker ...
>
> ...

A In my view the Federal Court in *Long bin Samat (supra)* did not say that the decision of the public prosecutor is immutable. Such a construction will impinge on the role of the court as the protector of the Federal Constitution. As wrongful prosecution or abusive or oppressive prosecution or failure to prosecute will create much imbalance in a number of provisions in the Federal Constitution which gives absolute protection to fundamental guarantees. As the public prosecutor enjoys his office directly and/or indirectly at the pleasure of executive, hence courts are constitutionally duty bound to safe guard executive encroachment. In the same context courts will rarely intervene in the decision making process of the public prosecutor to maintain law and order, unless public interest compels the court to do so. The court is and must be seen as the protector and guarantor of fundamental rights, and cannot consistently with the responsibility so laid upon it, refuse to entertain application seeking protection against infringement of such rights. See *Ramesh Thapar v. State of Madras*, AIR [1950] SC 124. Failure of the court to do so will create social anarchy and disinterestedness in judicial process, which will finally lead the public to have no faith in the Administration of Justice.

[10] Support for the above proposition that court always has inherent jurisdiction is found in various provision of Act of Parliament. For example, our legislature has in their wisdom safe guarded the judicial powers of the court in s. 25(1) of the Courts of Judicature Act 1964 which states as follows:

> Without prejudice to the generally of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

[11] Further support can be found in ss. 4 and 5 of CPC which reads as follows:

> s. 4: Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court

[12] It can be seen that the provisions of the Code are not meant to derogate the powers of the High Court.

> s. 5: As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.

[13] In reliance of the above, I can safely say that a judge of His Majesty is constitutionally bound to arrest a wrong at *limine* and that power and jurisdiction cannot be ordinarily fettered by the doctrine of Judicial Precedent. (See *Re: Hj Khalid Abdullah; Ex-Parte Danaharta Urus Sdn Bhd* [2008] 2 CLJ 326).

[14] In crux, I will say that there is no wisdom to advocate that the court has no inherent powers to arrest a wrong. On the facts of the case, I ought to have exercised my discretion and allowed the defence application at the earliest opportunity. However, I took the safer approach to deal with the same at the close of the prosecution's case, because of the failure of the prosecution to address me directly on the issue whether a charge for kidnapping can be sustained without the victim giving evidence.

[15] I have heard the evidence, read the submissions of the parties in detail. I agree with the defence that the prosecution has not made out a *prima facie* case. My reasons are as follows:

(a) A charge for kidnapping is unlikely to succeed if the victim is not present to appraise the court whether he or she was forcefully detained or not; unless the victim is not in a position to narrate the incident, etc. Support for the proposition is found in a number of cases:

(i) In *Ramakanta Panda & Ors v. Smt. Satyabhama Panda* [1995] Cri LJ 2409, the court observed:

> ... in the absence of a complaint that he was illegally arrested or abducted by sub-inspector of police, the question of proceedings against the accused for commission of offence of kidnapping does not arise ...

(ii) In *Ali Khalifa & Ors v. Emperor* AIR [1936] Patna 103 the court stated:

> It is apparent that Shebali has been deliberately keeping back the evidence of Jaso. There is thus no evidence whatever that Jaso was either kidnapped or abducted.

(iii) In *The State of UP and Anor v. Jaggo alias Jagdish and Others* AIR [1971], Supreme Court 1586 the court opined:

> Ramesh is the person with whom Lalu was talking at the time of the alleged occurrence. Ramesh was mentioned in the first information report. It is true that all the witnesses if the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called.

(b) Further, the absence of the victim and her evidence will show that the prosecution has not established one of the elements of the offence. In this case, from the evidence, it is quiet clear that the victim and the complainant were Indonesians. The prosecution was not able to show that the victim and the complainant on the relevant dates lawfully entered Malaysia and left Malaysia. The prosecution's case heavily relies on the evidence of the complainant PW3. During the course of evidence, I found that his demeanour did not reflect the evidence of a truthful witness. During the examination in chief, he acted as a farmer, quiet illiterate and humble. However, during cross examination, it was clear that he knew one of the accuseds, and there was some commercial transaction of substantial nature between them. And the said accused had actually lodged a police report relating to their detention before the complainant himself was detained. The defence has also highlighted many discrepancies in PW3's evidence. On the facts of the case, I do not wish to deal with each and every one of those issues, save that I am of the view that it is unsafe to rely on PW3's evidence and called upon the defence. Further, in this case the prosecutor has not preferred a charge of murder against the accused even though it is not too late to do so and this will show that the prosecution is not sure whether the victim is alive. It is the allegation of the prosecution that the victim was last seen with the accused and no charge of murder was preferred as was done in the case of *Sunny Ang v. PP* [1965] 1 LNS 171.

[16] In addition, the prosecution had not satisfied the court as to the issue relating to ransom. The learned deputy public prosecutor admits that the court cannot legislate but says s. 2 of KA 1961 allows the court to widely interpret to include 'money',

whether the money is lawfully owed to the accused or not. The prosecution had relied on the Singapore Court of Appeal decision of *Selvaraju s/o Satippan v. Public Prosecutor* [2004] SGCA 53; [2005] 1 SLR 238 which had relied on American cases to assert that a claim for commercial debt can amount to ransom. The court observed:

> Finally, the public interest demanded that ransom be defined for the purposes of s. 3 of the Kidnapping Act to include money rightfully belonging to the kidnapper. Otherwise, a loophole in the law would be created that would be readily exploited in future. In this respect, we would quote the judgment in *USA v. Escobar-Posado* at 83:
>
> > Finally, neither logic nor policy supports appellant's position. We provide formal, peaceful means for legitimate debts to be collected in part at least so that resort to force can be prohibited. The fact that appellant's claim for the money was not legitimate – the debt was clearly not a lawful one – hardly justifies the use of force.
>
> We would add that where the claim for payment was legitimate, as would have been the case if the appellant's story were true, it would still be unconscionable for the appellant to resort to violence to recover a legitimate debt owed to him when legal avenues remained open and unexplored.

[17] The learned counsel for the defence says that: (i) ransom is not defined in the Singapore Act. In that context, the courts in Singapore can define but not on such broad terms. It ought to have been defined as the public understands and is reflected in a numbers of dictionaries; (ii) the interpretation of criminal statute must lean in favour of the accused; *Selvaraju*'s case can be distinguished in that, the court did not believe the defence relating to commercial transaction and the subsequent demand. In this case, it was clear that there was commercial transaction between PW3 and one of the accused. Pursuant to that, PW3 owed money to the said accused. In consequence, PW3 signed a promissory note before a solicitor who had prepared the same. The solicitor gave evidence that it was done voluntarily. If the prosecution's case was otherwise, then they ought to have charged the solicitor but this was not done and that is consistent with the defence case that there was a sum due and owing.

[18] I am afraid our jurisprudence and the Federal Constitution do not permit the court to read into a penal Act meaning which may be prejudicial to the accused. More importantly, courts are required to interpret a criminal statute in favour of the accused and not in favour of the State. It is for parliament to enact. In this context, I take the view that it is not correct for the prosecution to rely on the above case. Having said that, I will say that it may be in the interest of the public for the attorney general office to amend the definition of ransom to include what has been expressed by the learned judges of the Court of Appeal in the above case to become like an addendum to the Kidnapping Act in Singapore.

[19] In our context, it is clear to me that the definition of ransom must necessarily mean any sum or consideration claimed without consideration. The section uses the word money, and also consideration. Established dictionaries also support my proposition and the payment is said for the release ie, the consideration is for the release and not otherwise to constitute ransom. I do not propose to deal with the definition in detail for the purpose of this case.

[20] For reasons stated above, I am satisfied that the prosecution has not established a *prima facie* case as advocated in the case of *Balachandran v. PP* [2005] 1 CLJ 85, the principles of which I have captivated in detail in *PP v. Mohd. Aszzid Abdullah* [2007] MLJU 300, which I do not wish to repeat here save that, this judgment must be read with the said case for adumbration of principles relating to *prima facie* case. In consequence, I make the following order:

(i) Ini ak Abong is acquitted and discharged.

(ii) Ling Hock Huat is acquitted and discharged.

(iii) Goh Meng Kun is acquitted and discharged.

(iv) Sydney Lau Chin Yin is acquitted and discharged.

(v) Ong Kim Hoe is acquitted and discharged.

I hereby order so.